

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

**FILED  
CLERK**

3/28/2019 9:43 am

**U.S. DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK  
LONG ISLAND OFFICE**

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:  
AYHAN TARTICI, :  
:  
Plaintiff, : 16-CV-5140 (ADS) (AKT)  
:  
February 26, 2019  
:  
V. : Central Islip, NY  
:  
SANT KARAM S, INC., et al., :  
:  
Defendant. :  
-----X

TRANSCRIPT OF CIVIL CAUSE FOR HEARING  
BEFORE THE HONORABLE A. KATHLEEN TOMLINSON  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: NEIL GREENBERG, ESQ.

For the Defendant: NO APPEARANCE

Audio Operator:

Court Transcriber: ARIA SERVICES, INC.  
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Proceedings recorded by electronic sound recording,  
transcript produced by transcription service

1 THE CLERK: Calling civil case 16-5140,  
2 Tartici v. Sant Karam S., Inc., et al.

3 Please state your appearance for the record.

4 MR. GREENBERG: Good afternoon again, your  
5 Honor. For the plaintiff, Neil Greenberg, 4242 Merrick  
6 Road, Massapequa, New York.

7 THE COURT: Good afternoon. Let me get  
8 started and then I have a number of questions I need to  
9 get resolved.

10 MR. GREENBERG: Yes, your Honor.

11 THE COURT: As you know, on a motion for  
12 entry of a default judgment, the first obligation the  
13 Court has is to insure that the claims that are made as  
14 stated actually satisfy all the elements legally for  
15 that particular cause of action, so that's what I'm  
16 going to address first, all right?

17 In this case, the plaintiff initially  
18 commenced this wage-and-hour action on September 15<sup>th</sup> of  
19 2016 against Sant Karam, Atlantis Management Group II,  
20 LLC, Harjit Singh, and Billy Ming, for violations of  
21 the Fair Labor Standards Act and the New York Labor  
22 Law, including the failure to pay overtime wages and  
23 failure to provide wage notices and statements. I just  
24 want to point out here at the beginning that it's my  
25 intention that the transcript of this proceeding, which

1 you'll take care of, is going to serve as the report  
2 and recommendation here to the district judge, who in  
3 this case is Judge Spatt.

4           After the initial defendants failed to  
5 timely answer or otherwise respond to the complaint,  
6 the plaintiff requested a certificate of default, which  
7 the Clerk of the Court entered on February 14<sup>th</sup> of 2017.  
8 That's found in the docket at DE-14 and 15. The  
9 plaintiff filed an amended complaint, which is the  
10 operative pleading in this case, on March 27<sup>th</sup>, 2017,  
11 removing Billy Ming as a named defendant and adding as  
12 named defendants the following principals of Sand  
13 Karam: Surinder Singh, Sukhwinder Singh, and Kulbir  
14 Singh. That's in the amended complaint, which is at  
15 DE-22.

16           Plaintiff seeks first of all declaratory  
17 relief that the defendants wilfully violated the  
18 overtime provisions of the Fair Labor Standards Act and  
19 the New York Labor Law, and the wage notice and wage  
20 statements requirements of the New York Labor Law.

21           Number 2: Have awarded compensatory damages  
22 including all overtime compensation owed.

23           Number 3: An award of interest on all New  
24 York Labor Law overtime compensation and other  
25 compensation, accruing for the date such amounts were

1 due.

2 And 4: Have awarded all costs and  
3 attorneys' fees incurred in prosecuting this action, as  
4 well as liquidated damages.

5 The defendants failed to timely answer or  
6 otherwise respond to the amended complaint and on  
7 February 19<sup>th</sup>, 2018, the plaintiff requested entry of a  
8 certificate of default. I note that prior to  
9 requesting the certificate of default against the  
10 defendants, the plaintiff submitted four court approval  
11 the proposed settlement with Atlantis, which Judge  
12 Spatt approved, and Atlantis was dismissed from this  
13 action. That's found in DE-38, 39, 44, and 45. 45 is  
14 the order dismissing Atlantis ultimately from the case.

15 The Clerk of the Court entered the  
16 certificate of default against the other defendants on  
17 February 26<sup>th</sup>, 2019. That's found at DE-42.  
18 Thereafter, the plaintiff submitted the instant motion  
19 for default judgment, which Judge Spatt referred to  
20 this Court for a report and recommendation. That's an  
21 order from March 27<sup>th</sup>, 2018. The referral order is  
22 found at DE-47.

23 As to the facts alleged here, the plaintiff  
24 is a resident of Ronkonkoma, New York. Sant Karam is a  
25 domestic corporation organized and existing under the

1 laws of the State of New York. Harjit, Surinder,  
2 Sukhwinder, and Kulbir are all individuals -- they're  
3 all Singh's, all residing in the State of New York.  
4 The plaintiff was employed by the defendants between  
5 2012 and July 12 of 2015 at the defendants' B.P. gas  
6 station located at 2840 Pond Road, Ronkonkoma, New  
7 York. At all relevant times, Sant Karam was an  
8 "enterprise" engaged in commerce or in the production  
9 of goods for commerce, with a gross annual volume of  
10 sales of not less than \$500,000 for the years 2013,  
11 '14, and '15. These are all allegations in the  
12 complaint, which because this is a default proceeding,  
13 the Court is required to accept as true, which is what  
14 I'm doing.

15 At all relevant times, Harjit, Surinder,  
16 Sukhwinder, and Kulbir were corporate officers of Sant  
17 Karam, who exercised operational and significant  
18 business function, controlled and devised, directed,  
19 implemented, and supervised employee wage-and-hour  
20 practices and policies. That's from the amended  
21 complaint paragraphs 12 to 15. The plaintiff also  
22 alleges that each defendant supervised the plaintiff,  
23 managed the day-to-day operations of the B.P. gas  
24 station at which the plaintiff worked, and participated  
25 in all relevant decisions related to plaintiff's

1 employment, including among other things the decision  
2 to hire, plaintiff's work schedule, and the plaintiff's  
3 pay.

4           Plaintiff alleges that during the course of  
5 his employment, he regularly worked seven days per  
6 week, for a total of 65 hours. That's in paragraphs 27  
7 and 28 of the amended complaint. Specifically, the  
8 plaintiff alleges that he worked Monday through Friday  
9 from 4:00 p.m. to 11:00 p.m. and Saturday from 10:00  
10 a.m. until Sunday 4:00 p.m. Plaintiff alleges he was  
11 always paid straight time in cash, at a regular rate of  
12 \$10 per hour. That's in paragraphs 32 to 34 of the  
13 complaint.

14           The plaintiff further alleges that he was  
15 never paid any overtime compensation or time and one-  
16 half his regular rate of pay when he worked more than  
17 40 hours per week, that he was never given  
18 uninterrupted meal breaks, and that he was never  
19 provided with wage statements or notices. That's in  
20 paragraphs 31 to 36 of the amended complaint. The  
21 plaintiff also alleges that the defendants acted  
22 wilfully and knew that their conduct violated the Fair  
23 Labor Standards Act or showed reckless disregard for  
24 the matter of whether their conduct violated the FLSA.

25           The legal standard here: When a party

1 against whom a judgment for affirmative relief is  
2 sought has failed to plead or otherwise defend, and  
3 that failure is shown by affidavit or otherwise, the  
4 clerk must enter the party's default. That's from  
5 Federal Rule of Civil Procedure 55(a). Once the  
6 clerk's certificate of default is issued, the moving  
7 party may then make an application for entry of a  
8 default judgment pursuant to Rule 55(b), as the  
9 plaintiff has done here. See also Kieit Constructors,  
10 Inc. v. Franbiltz (ph), 2007 W.L. 4405029 at \*2.  
11 That's a (W.D.N.Y December of 2007).

12 A default constitutes an admission of all  
13 well-pleaded factual allegations in the complaint and  
14 the allegations as they pertain to liability are deemed  
15 true. That's from Johann Promotions, Inc. v. El  
16 Morteño Restaurant Corporation 2007 W.L. 2891016 at \*2.  
17 (E.D.N.Y. September 28<sup>th</sup>, 2007), citing a well-known  
18 case in this area, Greyhound Exhibit Group, Inc. v.  
19 ELUL Realty Corp. 973 F.3d 155 at 158 (Second Circuit  
20 1992), cert. denied 506 U.S. 1080 (1993).

21 A default judgment entered on the well-  
22 pleaded allegations in the complaint establishes a  
23 defendant's liability. See for example Garden City  
24 Boxing Club v. Morales, 2005 W.L. 2476264 at \*3,  
25 (E.D.N.Y. October 7<sup>th</sup>, 2005), citing Bamboo Sales, Inc.

1 v. Ozark Trading, Inc., 58 F.3d 849 at 854 (Second  
2 Circuit 1995).

3           The determination of a motion for a default  
4 judgment is left to the sound discretion of the  
5 district court. See Shaw v. New York State Department  
6 of Civil Service, 168 F.3d 610 at 615 (Second Circuit  
7 1999); Merrill Lynch Business Financial Services, Inc.  
8 v. Brook Island, 2010 W.L. 2787553 at \*3 (E.D.N.Y. July  
9 14<sup>th</sup>, 2010).

10           As the Second Circuit has noted, when  
11 determining whether to grant a default judgment, the  
12 Court is guided by the same factors which apply to a  
13 motion to set aside entry of a default. See Pikarski  
14 v. Galaxyworld.com, Limited (ph), 249 F.3d 167 at 170  
15 to 171 (Second Circuit 2001); Enron Oil Corp. v.  
16 Diakuhara, 10 F.3d 90 at 96 (Second Circuit 1993).

17           These factors are, one, "whether the  
18 defendant's default was wilful," two, "whether the  
19 defendant has a meritorious defense to the plaintiff's  
20 claims," and three, "the level of prejudice the non-  
21 defaulting party would suffer as a result of the denial  
22 of the motion for default judgment." That's from the  
23 well-known case of Mason Tenders District Council v.  
24 Duchay Construction Corp. (ph), 2003 W.L. 1960584 at \*2  
25 (S.D.N.Y. April 25<sup>th</sup>, 2003).



1           The first factor we're going to look at here  
2 is wilfulness, and this is where I have some initial  
3 questions for you, Mr. Greenberg.

4           MR. GREENBERG: Yes, your Honor.

5           THE COURT: This has to do with the service  
6 of the summons and complaint. From what I saw here, I  
7 didn't really have any issues with the service of the  
8 original complaint, but some questions have arisen with  
9 the service of the amended complaint, and that's what I  
10 need to inquire about here.

11           Just as background, the plaintiff filed an  
12 affidavit of process service Michael Bilato (ph) of  
13 P.M. Legal, LLC on April -- excuse me, that's with  
14 respect to the first complaint. Then there is an  
15 affidavit from April 27<sup>th</sup>, 2017 indicating that summons  
16 and amended complaint in this action were personally  
17 served on Mr. Kulbir Singh on April 1<sup>st</sup>, 2017 at  
18 approximately 7:18 a.m., at 1653 Putney Road, Valley  
19 Stream, New York, 11580. The affidavit accompanying  
20 that is from Michael Bilato of P.M. Legal, LLC, the  
21 process servers in this case. With respect to service  
22 on Mr. Kulbir Singh of the amended complaint, I have no  
23 concerns and no issues. There's sufficient information  
24 here that the service was effective.

25           Turning to Surinder Singh, plaintiff filed

1 an affidavit from process service Louis Perez of P.M.  
2 Legal, LLC on May 26<sup>th</sup> of 2017, indicating that on May  
3 5<sup>th</sup>, 2017, following an attempt to personally serve  
4 Surinder Singh at 94-31 116<sup>th</sup> Street, apartment 1F,  
5 Richmond, New York, what's described as Surinder  
6 Singh's usual place of abode, a true copy of the  
7 summons and amended complaint was affixed to the door  
8 at the same.

9 The affidavit states that an additional copy  
10 of the summons and amended complaint was mailed to  
11 Surinder Singh at Surinder Singh's usual place of abode  
12 that same day and that "prior diligent efforts to  
13 effect personal service" were made on April 7<sup>th</sup>, 2017 at  
14 9:13 a.m. and April 10<sup>th</sup>, 2017 at 8:39 p.m.

15 Then with respect to Sukhwinder Singh,  
16 plaintiff filed an affidavit from process server again  
17 Louis Perez, indicating that on May 12<sup>th</sup> of 2017,  
18 following an attempt to personally serve Sukhwinder at  
19 9424 115<sup>th</sup> Street, Richmond, again now Sukhwinder's  
20 usual place of abode, which happens to be the same as  
21 listed for Surinder -- just for the record, Surinder is  
22 S-u-r-i-n-d-e-r, this latter is Sukhwinder, S-u-k-h-w-  
23 i-n-d-e-r. The process server says a true copy of the  
24 summons and amended complaint was affixed to the door  
25 at the same address.

1           The affidavit states that an additional copy  
2 of the summons and amended complaint was mailed to  
3 Sukhwinder at Sukhwinder's usual place of abode, his  
4 last-known address, and it's essentially that same day,  
5 and that "prior diligent efforts to effect personal  
6 service were made on April 7<sup>th</sup>, 2017 at 9:07 a.m. and  
7 April 10<sup>th</sup>, 2017 at 8:35 p.m.

8           The New York courts are all over the place  
9 about nail-and-mail service, not quite as all over the  
10 place as the federal courts, but I want to at least put  
11 this in the record. There's nothing in the arguments  
12 that were presented here explaining the propriety of  
13 nail-and-mail service and first-class mail service used  
14 to effect service of process for Surinder, Sukhwinder,  
15 Harjit, and Sant Karam. Under Rule 4(e)(1), an  
16 individual within a judicial district of the United  
17 States may be served by "following state law for  
18 serving a summons in an action brought in courts of  
19 general jurisdiction in the state where the district  
20 court is located or where service is made." That's  
21 from Rule 4(e)(1).

22           "Under New York law, service of process is  
23 governed by CPLR Section 308, which provides that, one,  
24 individuals may be served by delivering the summons to  
25 the person to be served -- see CPLR 308(1) or (2) -- by

1 delivering the summons 'to a person of suitable age and  
2 discretion at the actual place of business, dwelling  
3 place, or usual place of abode of the person to be  
4 served, along with mailing the summons to the person's  
5 last-known address of residence.'" That's from 308(2).  
6 Also see Allstate Insurance Company v. Rosenberg, 771  
7 F.Supp.2d 254, 260, 261 (E.D.N.Y. 2011).

8           Where service under paragraphs 1 and 2  
9 cannot be made with due diligence, Section 308(4)  
10 authorizes an alternative method of service commonly  
11 referred to as "nail-and-mail." By affixing the  
12 summons to the door of either the actual place of  
13 business, dwelling place, or usual place of abode  
14 within the state of the person to be served, then by  
15 either mailing the summons to such person at his or her  
16 last-known residence or by mailing the summons by  
17 first-class mail to the person to be served at his or  
18 her actual place of business.

19           The due diligence requirement of Section  
20 308(4) should be strictly observed, given the reduced  
21 likelihood that a summons served pursuant to that  
22 section will be received. That's from Kopec v. GMG  
23 Construction Corp., 2011 W.L. 2650597 at \*2 (E.D.N.Y.  
24 July 6<sup>th</sup>, 2011). Quoting Moran v. Harding, 212 A.D.2d  
25 517 (2<sup>nd</sup> Department 1995). However, New York courts

1 have not adopted a per se rule as to what constitutes  
2 "due diligence" under Section 308. That's from  
3 Allstate Insurance Company v. Rosenberg, 771 F.Supp.2d  
4 at 261.

5 See also Barnes v. City of New York, 415  
6 N.E.2d 1979. 1979 is the page number. It's actually a  
7 case from 1980 where the court said, "In determining  
8 the question of whether due diligence has been  
9 exercised, no rigid rule could properly be described."  
10 Consequently, courts evaluate whether attempts to  
11 effect service of process satisfy the due diligence  
12 requirement on a case-by-case basis. That's from  
13 Rosenberg at page 261.

14 Significantly, in evaluating such attempts,  
15 "courts should not focus on the quantity of the  
16 attempts at personal delivery but on their quality."  
17 That's also from Rosenberg and see as well McSorley v.  
18 Spear (ph), 50 A.D.2d 652 at 653 (2<sup>nd</sup> Department 2008).

19 Generally, three attempts at service on  
20 three nonconsecutive days will suffice. See Weifang  
21 Xinli Plastic Products v. JPM Trading, 2014 W.L.  
22 4244258 at \*3. (E.D.N.Y. August 26<sup>th</sup>, 2014). However,  
23 some courts find that irrespective of the number of  
24 attempts made, the process server must attempt to  
25 inquire about the defendant's location and place of

1 employment. See Serraro v. Staropoli, 94 A.D.3d 1083  
2 at 1085 (2<sup>nd</sup> Department 2012), where the Court said,  
3 "For the purposes of satisfying the due diligence  
4 requirement, it must be shown that the process server  
5 made genuine inquiries about the defendant's  
6 whereabouts and place of employment."

7 In addition, some courts require that the  
8 process server attempt service on a weekend. See for  
9 example Speth v. Zack, 36 A.D.2d, third, 410, (1<sup>st</sup>  
10 Department 2007), where the court held that the process  
11 server's attempts were insufficient to satisfy the due  
12 diligence requirement, where none of the attempts was  
13 made on a weekend, nor is there any indication that the  
14 process server made any inquiries to ascertain the  
15 place, meaning the party's whereabouts or place of  
16 business. See Johnson v. Waters, 291 A.D.2d 481 (2<sup>nd</sup>  
17 Department 2002).

18 Despite different courts' interpretations of  
19 due diligence under CPLR Section 308(4), federal courts  
20 generally look for evidence that the process server  
21 attempted to satisfy Section 308(1) or 308(2) before  
22 resorting to the nail-and-mail method and tried to  
23 ascertain the person's place of employment. See  
24 Serrano v. New York State Department of Environmental  
25 Conservation, 2015 W.L. 757268 at \*6 (N.D.N.Y. February

1 23<sup>rd</sup>, 2015), citing the Rosenberg case which I've  
2 already cited several times, at page 261.

3 Here it seems that the process server made  
4 three attempts to serve Surinder and Sukhwinder. With  
5 respect to Surinder, the process server attempted  
6 service at his last-known residence on Friday, April 7<sup>th</sup>  
7 at 9:13 a.m., Monday, April 10<sup>th</sup> at 8:39 p.m., and  
8 Friday, May 5<sup>th</sup>, 2017 at 6:39 a.m. As for Sukhwinder,  
9 the process server attempted service at his last-known  
10 residence on April 7<sup>th</sup> at 9:07 a.m., Monday, April 10<sup>th</sup>  
11 at 8:35 p.m., and Friday, May 12<sup>th</sup> at 6:55 a.m., keeping  
12 in mind that some of these addresses are the same.

13 Although the process server attempted  
14 service on different dates at different times, there's  
15 no indication in the relevant affidavits that the  
16 process server made any inquiry whatsoever with anyone  
17 about Surinder or Sukhwinder's whereabouts or place of  
18 employment. The Court notes and appreciates that  
19 service attempts were made outside of business hours,  
20 including on Friday morning before 7:00 and Monday  
21 evening after 8:00. However, the question arises, in  
22 keeping with the practice of the federal courts and  
23 interpreting due diligence requirements under 308(4),  
24 whether the process server's attempts meet or fall  
25 short of the due diligence requirement where the

1 process server appears to have made no inquiry with  
2 anyone about Surinder or Sukhwinder's whereabouts or  
3 place of employment. See Alliance Insurance Company v.  
4 Otero, 353 F.Supp.2d 415 at 420 (S.D.N.Y. 2004), where  
5 the court found due diligence satisfied where the  
6 process server made three attempts and inquired with a  
7 neighbor, who confirmed that the defendant lived at the  
8 address but could not provide the defendant's place of  
9 employment.

10           Personal service may also be made by first-  
11 class mail/certified mail under CPLR Section 312(a).  
12 Under that section, the latter one, 312(a), a summons  
13 may be served by mailing to the person or entity to be  
14 served by first-class mail, postage pre-paid, a copy of  
15 the summons together with two copies of a statement of  
16 service by mail and acknowledgment of receipt in the  
17 form of -- sorry, in the form set forth in (d) of this  
18 section with a return enveloped, postage pre-paid,  
19 addressed to the sender. However -- and this is a  
20 quote from a specific case. "However, for service to  
21 be complete, the defendant must return a signed  
22 acknowledgment of receipt to the plaintiff." That's  
23 from Robertson v. Allen, 2016 W.L. 205381 at \*6  
24 (N.D.N.Y. January 15<sup>th</sup>, 2016), citing specifically CPLR  
25 Section 312(a)(B).



1 Here the plaintiff certifies that Harjit and  
2 Sant Karam were served by first-class mail on March  
3 27<sup>th</sup>, 2017. However, the plaintiff does not indicate  
4 whether the plaintiff complied with CPLR Section  
5 312(a)'s other procedural requirements such as  
6 including an acknowledgment of receipt and return  
7 envelope, nor is there any indication that Harjit or  
8 Sant Karam ever returned signed acknowledgments of  
9 receipt.

10                   So that's my dilemma at the moment, Mr.  
11 Greenberg, and I've got to get answers to those  
12 questions. I'm ready to listen.

13 MR. GREENBERG: I don't think, without  
14 speaking to the process servers, I could answer those  
15 questions at this time.

16 THE COURT: Okay.

17 MR. GREENBERG: I would ask for time to  
18 investigate it with them and have them look at their  
19 files.

20 THE COURT: Okay.

21 MR. GREENBERG: Or re-serve.

22 THE COURT: I think you understand the  
23 problem here.

24 MR. GREENBERG: I do.

25 THE COURT: Okay. I'm going to go through

1 the rest of this just because I want to have this  
2 record today since the witness is here as well, but all  
3 of this is going to be subject to some -- I'm not going  
4 to be able to make a recommendation --

5 MR. GREENBERG: I understand.

6 THE COURT: -- and I'm going to have to tell  
7 the judge that, until this issue is resolved, okay?

8 MR. GREENBERG: Yes, your Honor.

9 THE COURT: So what I may do is suggest to  
10 him that for the moment, he may have to deny this  
11 without prejudice and with the right for you to bring  
12 it back again, okay?

13 MR. GREENBERG: Thank you, your Honor.

14 THE COURT: Let me go through the rest, as I  
15 said, at least to make the record, okay?

16 MR. GREENBERG: Thank you.

17 THE COURT: Let's assume for the moment that  
18 we're going to get the service issues worked out and  
19 that service was in fact properly effectuated. That  
20 means then we turn to the second prong of the test,  
21 which deals with a meritorious defense. That whole  
22 issue of the service actually goes to the first prong  
23 of the test here as to wilfulness. If we find that the  
24 service was proper, there's no question in the Court's  
25 mind that the failure to respond here was indeed

1 wilful, all right?

2 MR. GREENBERG: Yes, your Honor.

3 THE COURT: Turning to the next factor, the  
4 Court is unable to make a determination whether the  
5 defendants have a meritorious defense since no such  
6 defense has been presented to the Court. See Bridge  
7 Oil, Limited, 2008 W.L. 5560868 at \*2, Empire State  
8 Carpenters Welfare v. Darken Architectural Wood, 2012  
9 W.L. 194075 at \*3 (E.D.N.Y. January 17<sup>th</sup>, 2012).

10 Although defendants' default constitutes an  
11 admission of all the factual allegations in the  
12 complaint as they relate to liability, plaintiffs must  
13 nevertheless demonstrate that the uncontested  
14 allegations set forth valid claims. That's from Said  
15 v. SPS Electronics, 2010 W.L. 1265186 at \*2 (E.D.N.Y.  
16 February 24<sup>th</sup>, 2010).

17 Plaintiff's amended complaint asserts four  
18 causes of action. First, violations of the Fair Labor  
19 Standards Act for failure to pay plaintiff overtime  
20 wages. Second, violations of the New York Labor Law  
21 for effectively the same behavior. Third, violations  
22 of the New York Labor Law for failing to provide wage  
23 notices. And four, violations of the New York Labor  
24 Law for failure to provide wage statements.

25 I turn now to the first claim, which is

1 liability under the FLSA. "To establish a claim under  
2 the FLSA, plaintiff must prove the following: Number  
3 one, the defendant is an employer subject to the Fair  
4 Labor Standards Act. Two, the plaintiff is an employee  
5 within the meaning of the FLSA. Three, the employment  
6 relationship is not exempted from the FLSA." That's  
7 from Saucedo v. On The Spot Audio Corporation, 2016  
8 W.L. 8376837 at \*4 (E.D.N.Y. December 21<sup>st</sup>, 2016).  
9 Report and recommendation adopted by 2017 W.L. 780799  
10 (E.D.N.Y. February 28, 2017). Vacated on other grounds  
11 sub nom, Saucedo v. On The Spot Audio Corporation, 2018  
12 W.L. 4347791 (E.D.N.Y. January 23<sup>rd</sup>, 2018).

13 A defendant is an "enterprise engaged in  
14 commerce or in the production of goods for commerce" if  
15 the defendant is an enterprise that "has employees  
16 engaged in commerce or in the production of goods for  
17 commerce, or that has employees handling, selling or  
18 otherwise working on goods or materials that have been  
19 moved in or produced for commerce by any person, and  
20 whose annual gross volume of sales made or business  
21 done is not less than \$500,000." That's from 29 United  
22 States Code Section 203(s)(1)(A)(i).

23 An employer is subject to both the minimum  
24 age and overtime provisions of the FLSA if either, one,  
25 their employees are engaged in commerce, or two, the

1 employer is an enterprise engaged in commerce. That's  
2 from 29 United States Code Sections 206 and 207. See  
3 Padilla v. Menlapaz, 643 F.Supp.2d 298 at 299 (E.D.N.Y.  
4 2009). The statute defines "commerce" as "trade,  
5 commerce, transportation, transmission or communication  
6 among the several states or between any state and  
7 anyplace outside thereof." That's from Section 203(b).  
8 These two methods of establishing FLSA coverage are  
9 known as "individual coverage" and "enterprise  
10 coverage" respectively. Jacobs v. New York Foundling  
11 Hospital, 483 F.Supp.2d 251 at 257 (E.D.N.Y. 2007).

12 Plaintiff has pleaded that at all relevant  
13 times, Sant Karam had employees engaged in commerce or  
14 in the production of goods for commerce, including  
15 plaintiff, and had a gross annual of at least \$500,000.  
16 That's from paragraphs 47 to 50 of the amended  
17 complaint. Plaintiff has therefore sufficiently  
18 pleaded that Sant Karam is subject to the FLSA. See  
19 Furman v. Las Delicias Peruzuanas Restaurant, Inc., 93  
20 F.Supp.3d 19 at page 33 (E.D.N.Y. March 19<sup>th</sup>, 2015),  
21 where the court found a complaint which simply restated  
22 the statutory definition to be sufficient because it  
23 was reasonable to infer that the myriad goods necessary  
24 to operate a restaurant with an eat-in dining area and  
25 over \$500,000 in annual sales do not exclusively come

1 from New York State.

2 As for the individual defendants, Harjit,  
3 Kulbir, Surinder, and Sukhwinder Singh, plaintiff  
4 alleges that during the relevant period of time, each  
5 individual defendant was a corporate officer of Sant  
6 Karam -- that's from the amended complaint paragraphs  
7 12 to 15 -- who exercised operational and significant  
8 business function control over Sant Karam and actively  
9 participated in running the day-to-day operations of  
10 their B.P. gas station.

11 Under the FLSA, an employee is "any person  
12 acting directly or indirectly in the interests of an  
13 employer in relation to an employee." That's from 29  
14 United States Code Section 203(d). A person is defined  
15 as "an individual, partnership, association,  
16 corporation, business trust, legal representative, or  
17 any organized group of persons." That's from Section  
18 203(a). To employ means "to suffer or permit to work."  
19 That's from Section 203(g). An individual may be  
20 liable as an employer under the FLSA so long as he  
21 exercises "operational control" over the employee in  
22 question. See a well-known case, Irizarry v.  
23 Katsamatedis (ph), 722 F.3d 99 at 110 (Second Circuit  
24 2013). Individuals who are found to be employers under  
25 the FLSA may be held jointly and severally liable to

1 the plaintiff. See Moon v. Qwon, 248 F.Supp.2d 201 at  
2 237 (S.D.N.Y. 2002).

3           Based on the allegations in the complaint  
4 regarding individual defendants Harjit, Kulbir,  
5 Surinder, and Sukhwinder Singh, plaintiff has  
6 adequately alleged the elements necessary to state a  
7 claim against each as an employer. Thus, Sant Karam  
8 and the individual defendants would be jointly and  
9 severally liable to the plaintiff. See Saucedo, 2016  
10 W.L. 8376837 at \*5.

11           As to an employee, under the Fair Labor  
12 Standards Act, an employee is "any individual employed  
13 by an employer," a very helpful definition.  
14 Nonetheless, that's from Section 203(e)(1). "In so far  
15 as plaintiff's complaint alleges that defendants  
16 employed the plaintiffs within the statutory meaning,  
17 it follows that for purposes of this default, they  
18 qualify as employers under the FLSA." That's from the  
19 Furman case, 93 F.Supp.3d at page 32.

20           Because the plaintiff has alleged his status  
21 as an employee with defendants and because these  
22 allegations are plausible and sufficiently supported,  
23 plaintiff has satisfied the second element of his FLSA  
24 claim, keeping in mind plaintiff does not have to prove  
25 his claims here. He only has to sufficiently state

1     them in a legal context.

2             As to the exemption issue, "The issue of  
3     whether an employee's responsibilities render the  
4     employee exempt from the FLSA's overtime provision is a  
5     question of law." That's from McBeth v. Gabrielli  
6     Truck Sales, Limited, 768 F.Supp.2d 383 at 387  
7     (E.D.N.Y. 2010). The Court is satisfied that there are  
8     no exemptions under the FLSA which would in these  
9     circumstances, based on the nature of the plaintiff's  
10    employment with the defendant as landscapers. Based on  
11    the above analysis, the plaintiff has pleaded the  
12    necessary elements for a claim under the FLSA.

13            As to liability under the New York Labor  
14    Law, for essentially the same reasons, plaintiffs have  
15    also adequately pleaded a claim under the New York  
16    Labor Law, since the components are the same. See  
17    Saucedo, 2016 W.L. 8376837 at \*6, where the court said  
18    the New York Labor Law and the FLSA are analytically  
19    nearly identical.

20            The final factor to consider is whether the  
21    non-defaulting party would be prejudiced if the motion  
22    for default were to be denied. Denying this motion  
23    would be prejudicial to the plaintiff since there are  
24    no additional steps available to secure relief in this  
25    Court. That's from Bridge Oil, Limited, 2008 W.L.



1 5560868 at \*2. Trustees of the Pavers and Road  
2 Builders District Council Welfare Pension Annuity and  
3 Apprenticeship, Skill Improvement and Safety Funds v.  
4 JREM Construction Corp., 2013 W.L. 618738 at \*4  
5 (E.D.N.Y. January 28<sup>th</sup>, 2013). If a judgment is not  
6 granted here, the plaintiff will have no alternative  
7 legal redress to recover his statutorily entitled wages  
8 for work done.

9           Since all three factors necessary to  
10 establish a default have been satisfied, namely  
11 wilfulness, the absence -- let's put it this way: I'm  
12 assuming for the moment that wilfulness will be proven  
13 once we get the service issues resolved. If that  
14 proves true, that factor plus the absence of  
15 meritorious defenses and prejudice in the absence of a  
16 default judgment would be clear here, I find that the  
17 plaintiff has, taking those things into account,  
18 sufficiently pleaded the claim. I would recommend,  
19 contingent on us resolving this other issue,  
20 respectfully recommend to Judge Spatt that judgment as  
21 to liability be entered against the defendants.

22           Now let's talk about the relief sought here.  
23 Although a default judgment entered on the well-pleaded  
24 allegations in the complaint establishes a defendant's  
25 liability, a plaintiff must still prove damages. See

1 Cement and Concrete Workers District Council Welfare  
2 Fund, et al. v. Metro Foundation Contractors, Inc., 699  
3 F.3d 230 (Second Circuit 2012). In determining damages  
4 not susceptible to simple mathematical calculations,  
5 Rule 55(b)(2) of the Federal Rules of Civil Procedure  
6 gives courts discretion to determine whether an  
7 evidentiary hearing is necessary or whether detailed  
8 affidavits or documentary evidence are sufficient.

9           “The Second Circuit has approved the holding  
10 of an inquest by affidavit without an in-person court  
11 hearing, as long as the court has insured that there  
12 was a basis for the damages specified in the default  
13 judgment.” That’s from LaBarbera v. Les Sub-surface  
14 Plumbing (ph), 2008 W.L. 906695 at \*3 (E.D.N.Y. April  
15 3<sup>rd</sup>, 2008), quoting Transatlantic Marine Claims Agency  
16 v. Ace Shipping Corporation, 109 F.3d 105 at page 111  
17 (Second Circuit 1997). Despite the submissions in  
18 support of the plaintiff’s motion for entry of a  
19 default judgment, the Court determines that an in-  
20 person inquest is necessary for a determination of the  
21 specific damages.

22           Now turning to those damages. The  
23 plaintiff’s motion for a default judgment sets forth  
24 calculations of damages and the information that I’m  
25 listing here is taken from the motion and accompanying

1 exhibits. The plaintiff states that he worked 65 hours  
2 per week, alleging that he worked Monday through Friday  
3 from 4:00 p.m. to 11:00 p.m. and Saturday from 10:00  
4 a.m. to Sunday at 4:00 p.m. Plaintiff further alleges  
5 that he was paid \$10 straight time for all 65 hours  
6 worked per week and therefore was underpaid 25 hours  
7 each week. According to the plaintiff's estimated  
8 calculation of damages spreadsheet which was attached  
9 to the motion, the plaintiff is owed back wages for 25  
10 overtime hours for seven weeks in 2013, 28 weeks in  
11 2015, and 52 weeks in 2014.

12 According to the plaintiff, since he should  
13 have received \$15 an hour for each hour worked over 40  
14 hours a week, he's owed \$5 an hour for 25 hours for 87  
15 weeks. He claims that he is then owed \$125 per week  
16 for seven weeks in 2013, \$125 per week for 52 weeks in  
17 2014 and '15. So what I would like to do now because I  
18 have some questions about this and I'm going to let you  
19 ask the questions to get the record established here,  
20 is to swear in your client and have him take the  
21 witness stand, all right?

22 MR. GREENBERG: Yes, your Honor.

23 THE COURT: Why don't you step up.

24 (Witness is sworn.)

25 THE CLERK: Please state your name for the

1 record. Just state your name.

2 THE COURT: You need to state your name for  
3 the record.

4 MR. GREENBERG: What is your name?

5 THE WITNESS: Ayhan Tartici.

6 THE COURT: My goal, Mr. Greenberg, is to  
7 get as many facts in here as we can, okay?

8 MR. GREENBERG: Yes, your Honor. May I  
9 begin, your Honor?

10 THE COURT: Yes, go ahead.

11 MR. GREENBERG: Thank you.

12 DIRECT EXAMINATION

13 BY MR. GREENBERG:

14 Q. So you know we're here to talk about the work  
15 you did at the gas station, correct?

16 A. Yes.

17 Q. All right. Going back to 2013, can you tell  
18 us the name of the company that you worked for in the  
19 gas station?

20 A. Sant Karam, Inc.

21 Q. Sant Karam S, Inc., technically?

22 A. Yes.

23 Q. What type of business did they have?

24 A. Gas station and store.

25 Q. What kind of store did they have as part of

1 the gas station?

2 A. Convenience store.

3 Q. What did you do for the company?

4 A. I work as cashier and, you know, inside the  
5 store, like cleanup and filling, you know.

6 MR. GREENBERG: May I lead a little bit,  
7 your Honor?

8 THE COURT: Yes.

9 MR. GREENBERG: Thank you.

10 BY MR. GREENBERG:

11 Q. So if a customer came in and paid cash, would  
12 you service that customer for the gas?

13 A. Yes.

14 Q. Then there's like a mini-store attached to the  
15 gas station, correct?

16 A. Yes.

17 Q. And you would sell all sorts of items from  
18 paper goods to soda and cigarettes and such?

19 A. Yes, beer, cigarettes, coffee, ice cream,  
20 everything, like chips.

21 Q. Okay. And you began working there on November  
22 8, 2013, correct?

23 A. Yes.

24 Q. And your first full week began when?

25 A. November 10.

1 Q. 2013?

2 A. Yes.

3 Q. What was the last date of your employment  
4 working for them?

5 A. July, 2015.

6 Q. Was that July 12, 2015?

7 A. Yes.

8 Q. But the last full week ended on the 11<sup>th</sup>, is  
9 that correct?

10 A. Yes, because only one day was different.

11 Q. All right. When you worked at the gas  
12 station, were you given any formal break times that you  
13 could take?

14 A. No.

15 Q. In fact, were you the only person working at  
16 the gas station in the hours that you were working at  
17 the gas station?

18 A. Yeah, I was.

19 Q. How many days a week did you work there?

20 A. Seven.

21 Q. What was your schedule Monday through Friday?

22 A. 4:00 to 11:00 p.m.

23 Q. Okay. On Saturday through Sunday, what was  
24 your schedule?

25 A. Saturday, I was doing 10:00 a.m. until Sunday

1 afternoon at 4:00 p.m.

2 Q. So that's about a thirty-hour time period?

3 A. Yes.

4 Q. Did you get to eat during that time period?

5 A. Yeah, I did.

6 Q. How did you accomplish that?

7 A. I'm living only two blocks away from gas  
8 station. My family, my wife and my kids would bring my  
9 food.

10 Q. So they would bring you food. Would you take  
11 a formal break to eat or how would you eat?

12 A. No, there is no time for break because I'm  
13 alone, you know. If customer comes at the same time, I  
14 have to serve them, you know.

15 Q. What would you do if you had to go to the  
16 men's room, to go to the bathroom?

17 A. We have a sign that says, we'll be back in ten  
18 minutes, we're using the bathroom.

19 Q. Would you lock the door?

20 A. Yes, everything, all the doors.

21 Q. And then take care of your needs and then take  
22 the sign down and unlock the door?

23 A. Yeah, when I come back, I open the door and  
24 take the sign out and continue work.

25 Q. You were working a minimum of 65 hours per

1 week, is that correct?

2 A. Yes.

3 Q. All right.

4 THE COURT: Let me stop you there for a  
5 second if you don't mind. There are a couple of things  
6 I want to ask. When you were working Monday through  
7 Friday 4:00 to 11:00, was that every single day for  
8 those two and a half or more years that you were  
9 working there? Your schedule never changed?

10 THE WITNESS: No, it never changed because I  
11 have a morning job, that's why.

12 THE COURT: Okay. You say you worked alone.

13 THE WITNESS: Right.

14 THE COURT: How did you get into the station  
15 or the business when you got there?

16 THE WITNESS: What do you mean?

17 THE COURT: How did you -- first of all,  
18 were you taking over for somebody else who was on  
19 shift?

20 THE WITNESS: Yeah. When I come at 4:00,  
21 the morning guy is leaving. When I come, I take from  
22 him.

23 THE COURT: Okay. So at 11:00 at night,  
24 when you were leaving, what did you do?

25 THE WITNESS: Night shift guys coming and I



1 leave, he stay.

2 THE COURT: So the station was open 24 hours  
3 a day?

4 THE WITNESS: 24 hours, yes.

5 THE COURT: Let me ask you about Saturday to  
6 Sunday because this is where I have -- need to clarify  
7 something. You say you worked for thirty hours  
8 straight.

9 THE WITNESS: Yes.

10 THE COURT: Okay. When you started this  
11 job, was that explained to you by the owners?

12 THE WITNESS: I mean not -- yeah, because  
13 they give me the schedule. They told me that's the  
14 hours, will you come? Yes.

15 THE COURT: Okay. And the schedule that  
16 they gave you, was it in writing?

17 THE WITNESS: No, just by talking, you know.

18 THE COURT: They just told you what hours  
19 you would be working.

20 THE WITNESS: Yes.

21 THE COURT: Okay. And they made it clear to  
22 you from the beginning that you were going to be there  
23 from 10:00 a.m. on Saturday morning until 4:00 in the  
24 afternoon the following day?

25 THE WITNESS: Yes.

1 THE COURT: When were you supposed to sleep?

2 THE WITNESS: Well, when I worked there on  
3 the weekends, I don't sleep.

4 THE COURT: Okay. They told you that you  
5 were going to be there for more than 24 hours in that  
6 time period?

7 THE WITNESS: Yeah, only weekends, yes.

8 THE COURT: Okay. What did they tell you  
9 about that?

10 THE WITNESS: Well, they say, we don't have  
11 -- we just don't want to hire any employee for one day  
12 so we need one guy who can stay, so I said okay.

13 THE COURT: And the entire time that you  
14 were employed, were you working every single Sunday?  
15 Nobody else ever worked any of those Sundays?

16 THE WITNESS: No. When I leave at 4:00,  
17 other person come in.

18 THE COURT: Okay. So no one else ever came  
19 to relieve you during that time.

20 THE WITNESS: No.

21 THE COURT: Go ahead, Mr. Greenberg.

22 BY MR. GREENBERG:

23 Q. Did you ever have to punch into a clock for  
24 your employer?

25 A. No, we don't have punch clock. We writing on

1 the shift paper, you know.

2 Q. So that's my next question. Did you make your  
3 employer aware in writing of the hours that you were  
4 working every week?

5 A. Yes, we do.

6 Q. Take your time and explain to the Court how  
7 you did that.

8 A. Which --

9 Q. The judge.

10 THE COURT: How did you keep track of your  
11 time, basically?

12 THE WITNESS: Oh, the time. When we get in  
13 the store, we writing, you know, what time we came.

14 THE COURT: Let me stop you. You write down  
15 what time you got there.

16 THE WITNESS: Yeah, for the --

17 THE COURT: Is there some form you were  
18 writing that on or just on a piece of scrap paper?

19 THE WITNESS: No, there's a paper which  
20 shows you like everything on it, like how many  
21 cigarettes we have, how many beer we have, which  
22 employee worked that day and how many hours, what time  
23 start, how many carton of cigarettes we have.  
24 Everything is on that paper that we call the shift  
25 paper.

1 THE COURT: So it was basically an  
2 inventory, what was in the store at the time, right?

3 THE WITNESS: That's not inventory, that's  
4 day shift, like the shift.

5 THE COURT: Okay.

6 THE WITNESS: Like you know, after end of  
7 the day, we write all the sales on it.

8 THE COURT: I see.

9 THE WITNESS: Like gas, how much regular gas  
10 we sell.

11 THE COURT: So it's how much you sold.

12 THE WITNESS: Yeah, how much we sold regular  
13 gas, how much super, how much diesel. Everything is on  
14 that.

15 THE COURT: Okay.

16 THE WITNESS: And there is like cigarettes,  
17 beer, coffee, lotto, you know, everything is on there.  
18 And there is -- on the side of the corner is the  
19 employee name.

20 THE COURT: Okay.

21 THE WITNESS: How many hours you worked, how  
22 many drops you did, safe drops, and how much was it.  
23 Everything is on that shift paper, you know.

24 THE COURT: What happened to that sheet of  
25 paper?

1 THE WITNESS: They have it, the owner.

2 THE COURT: How often did you have to hand  
3 that sheet of paper in?

4 THE WITNESS: Every day.

5 THE COURT: Every day?

6 THE WITNESS: Every day.

7 THE COURT: Okay. Do you know what the  
8 business did with that, with those sheets of paper?

9 THE WITNESS: When I left, we was keeping  
10 everything in the office, you know, and they come in  
11 and grab it next day.

12 THE COURT: Okay.

13 THE WITNESS: With the money, with the safe  
14 money, everything.

15 THE COURT: Okay.

16 THE WITNESS: They come and get it.

17 THE COURT: Okay.

18 THE WITNESS: And they check after like --  
19 we making whatever we making in the gas station.

20 THE COURT: Yes.

21 THE WITNESS: I believe they check it in the  
22 office, you know.

23 THE COURT: Were you on some kind of an  
24 honor system? Was anybody ever checking to make sure  
25 you were there?

1           THE WITNESS: I believe they checking  
2 because they making deposits, you know. They opened  
3 the safe. Whatever money we throw in, they come next  
4 day, they take it. It shows over there like I said,  
5 how many cigarettes they sell, how many lotto, how many  
6 beers.

7           THE COURT: But as far as the number of  
8 hours you were working, they were basically taking your  
9 word for it based on what you filled in on the sheet,  
10 right?

11          THE WITNESS: Yeah, we fill it up and they  
12 come and grab it next day, you know.

13          THE COURT: Were you always paid the amount  
14 of hours that showed on that sheet?

15          THE WITNESS: Yeah.

16          THE COURT: Okay, but straight time.

17          THE WITNESS: Straight.

18          THE COURT: Okay. Go ahead, Mr. Greenberg.

19          THE WITNESS: Every Sunday when I leave for  
20 new week, we getting paid and we take the -- from the  
21 -- they know everything. Everything is on that paper.

22          THE COURT: Okay.

23 BY MR. GREENBERG:

24          Q. Did you pay yourself?

25          A. Yeah.

1           Q.   So am I correct that you would write down on  
2 one of these sheets the number of hours that you  
3 worked, then you would deduct \$10 an hour for every  
4 hour you worked from the cash that you would put in the  
5 little drop box?

6           A.   Yeah. You know like how you drop at safe?

7           Q.   Yes.

8           A.   You know, like money, safe money. We don't  
9 want to keep money too much in the register and we --  
10 let's say you have \$600 or \$700. You write your name,  
11 you take your pay out from register, and they have my  
12 name over there. Same thing with when we leave Sunday,  
13 I get paid like that. I make the safe, put my name,  
14 but I take my money and they're okay with that.

15          Q.   Did they ever question the amount of hours  
16 that you put down that you worked every week?

17          A.   No.

18          Q.   Was it pretty much the same hours every single  
19 week?

20          A.   Yeah.

21          Q.   As you sit here now, do you believe that if  
22 the employer was to have maintained those records when  
23 you would write down the hours and they were to come to  
24 court, they would be able to show the Court that you  
25 listed those same hours every week and that you

1 deducted the cash for it, correct?

2 A. Yes. I wish I can have copy to show, you  
3 know.

4 THE COURT: Mr. Greenberg, hang on one  
5 second.

6 Did you get paid every -- did you take your  
7 pay every day or once a week?

8 THE WITNESS: No, every week, only Sunday.

9 THE COURT: Once a week, okay.

10 THE WITNESS: Yeah, only Sunday when I  
11 leave.

12 THE COURT: So when you left on Sunday,  
13 whatever cash was there, you would count out the number  
14 of hours you worked. What was your rate of pay, \$10 an  
15 hour?

16 THE WITNESS: \$10, yeah.

17 THE COURT: Times \$10 an hour. You'd take  
18 that amount of cash.

19 THE WITNESS: Right.

20 THE COURT: And that was your pay.

21 THE WITNESS: Right.

22 THE COURT: Did you ever leave notes for  
23 them about how much you were taking?

24 THE WITNESS: Oh, yeah. They know like  
25 every week, we do same.



1 THE COURT: Okay.

2 THE WITNESS: I do like a safe drop. I put  
3 my name and \$650 or whatever and put safe drop and the  
4 envelope number, like which number envelope that I use.  
5 So when they open that envelope, they know my pay I got  
6 from there.

7 THE COURT: Okay.

8 THE WITNESS: There is a receipt coming out  
9 from register, it says pay out. That's the way I get  
10 paid.

11 THE COURT: Okay.

12 BY MR. GREENBERG:

13 Q. Did you take any vacations or breaks from work  
14 during the years you worked for this employer?

15 A. No.

16 Q. Were there people that relieved you -- in  
17 other words, other than the thirty-day period -- let me  
18 say it this way: Including the thirty-hour period, I  
19 should say, did you work until somebody relieved you,  
20 like tag? They came in and said, we're ready to go?

21 A. Yeah, because otherwise, I can't leave, like  
22 somebody has to come take over.

23 Q. Were there times when the relief person didn't  
24 show up?

25 A. No, not show up but sometimes was late a

1 couple hours.

2 Q. So there were times when the relief person  
3 would show up what, one or two hours late?

4 A. One hour, two hours, yeah.

5 Q. Would you continue to work the one or two  
6 hours until somebody showed up?

7 A. Yeah, I have to. I have to. Nobody else  
8 there. I have to.

9 Q. At the end of the week then, did you increase  
10 your pay by either \$10 or \$20, depending on whether  
11 they showed up one or two hours late?

12 A. Yeah. Sometimes I take like two hours extra  
13 or sometimes I come to work like two hours late, you  
14 know. Like instead of 4:00, I come 5:00, you know, the  
15 same guy is coming.

16 Q. By coming let's say two hours late, instead of  
17 taking the money, you were trying to maintain the same  
18 number of hours every week?

19 A. Yeah, trying to keep my salary, yeah.

20 Q. And get the same pay every week.

21 A. Right.

22 MR. GREENBERG: I think that's pretty much  
23 it, your Honor.

24 THE COURT: Let me just ask a few more  
25 questions, if you don't mind.

1 MR. GREENBERG: Please, thank you, your  
2 Honor.

3 THE COURT: When you were hired or at any  
4 time during the time you were employed there, did you  
5 ever have a conversation with any of the owners about  
6 overtime?

7 THE WITNESS: No, we never talk about  
8 overtime but I asked a couple of time raise. They say  
9 they gonna give but I never get.

10 THE COURT: So you made an inquiry of them  
11 at some point why you weren't being paid overtime?

12 THE WITNESS: I'm sorry?

13 THE COURT: Did you ever ask them why you  
14 weren't --

15 THE WITNESS: Overtime? No, because they  
16 say this is the hour, you know.

17 THE COURT: So when you first met with them  
18 and throughout the time of your employment, they told  
19 you you're making \$10 an hour and that's it.

20 THE WITNESS: Yeah.

21 THE COURT: Okay.

22 THE WITNESS: But they say -- when I go over  
23 there for hiring --

24 THE COURT: Yes.

25 THE WITNESS: -- I talk to manager. Manager

1 told me like, you know, you're gonna start working a  
2 couple months and then they will raise you up, but I  
3 never got a raise.

4 THE COURT: So you were paid \$10 an hour  
5 throughout the time you were there.

6 THE WITNESS: Yes, ma'am.

7 THE COURT: Okay. And no one ever came to  
8 talk to you about being paid overtime or not being paid  
9 overtime.

10 THE WITNESS: No one.

11 THE COURT: Did you ever go to anybody  
12 yourself, whether it was another shift person or any  
13 one of the supervisors, and tell them you thought you  
14 were supposed to be getting overtime?

15 THE WITNESS: I asked with the manager  
16 talking.

17 THE COURT: Yes.

18 THE WITNESS: He said, they're gonna take  
19 care of you, like I said, but --

20 THE COURT: It never happened.

21 THE WITNESS: Never happened.

22 THE COURT: Okay.

23 BY MR. GREENBERG:

24 Q. Did you say you asked for a raise?

25 A. I did.

1 Q. What happened?

2 A. They say okay, we thinking, but never get it.

3 Q. Never got the raise.

4 A. Never got the raise.

5 THE COURT: Okay.

6 BY MR. GREENBERG:

7 Q. Did you ask once or more than once?

8 A. Twice.

9 Q. Twice?

10 A. Yeah.

11 Q. And they just ignored it?

12 A. They didn't tell me directly. They tell me  
13 with the manager -- I'm asking manager like, what  
14 happened? Oh, they're gonna come talk to you but never  
15 happened.

16 THE COURT: Didn't happen.

17 THE WITNESS: Never happened.

18 THE COURT: I'm not sure you can answer this  
19 but let me ask the question. When you were working in  
20 the store, did you ever notice any posters in the store  
21 anywhere or around the store anywhere or even around  
22 the pumps or that part of the gas station that were  
23 from the Department of Labor saying what your wages  
24 were supposed to be or how you were to get paid?

25 THE WITNESS: There was one sign inside the

1 store, where they keep all the stock, like garbage bags  
2 and this, but it was already full. I never think to  
3 look or read, you know.

4 THE COURT: When you first came to work  
5 there, nobody ever gave you a piece of paper saying,  
6 here's the number of hours you're going to be working  
7 each week and here's what your rate of pay is.

8 THE WITNESS: No, there was no paperwork.

9 THE COURT: Okay. All right, I think we're  
10 good.

11 MR. GREENBERG: Thank you, your Honor.

12 THE COURT: You can step down, Mr. Tartici,  
13 thank you.

14 THE WITNESS: Thank you, your Honor. Thank  
15 you.

16 THE COURT: I just want to talk for a couple  
17 of minutes about the chart of the damages, okay?

18 MR. GREENBERG: Yes, your Honor.

19 THE COURT: I don't think I have that with  
20 me. Just bear with us for a minute, all right?

21 MR. GREENBERG: Yes, your Honor.

22 (Pause in proceedings.)

23 THE COURT: I'm looking at the chart now.

24 MR. GREENBERG: Yes, your Honor.

25 THE COURT: I want to get the numbers

1 resolved here. Also, in looking at this chart, there  
2 were two basically corrections that were made in  
3 response to some additional information that I had  
4 asked for, and I received back a letter from Mr.  
5 Williams. The two things in here that impact the  
6 chart, just so we have this in the record -- it says  
7 here the start date of December 30<sup>th</sup> with respect to the  
8 New York Labor Law section of the chart was pasted in  
9 error. That date should actually read November 10<sup>th</sup> of  
10 2013.

11 MR. GREENBERG: Yes, your Honor.

12 THE COURT: Do you see that?

13 MR. GREENBERG: Yes, your Honor.

14 THE COURT: So I'm going to amend obviously  
15 the chart to that extent.

16 MR. GREENBERG: Thank you.

17 THE COURT: As Mr. Williams said, with that  
18 change, however, there's no impact on the overall  
19 calculation because the numbers of weeks worked column  
20 here is actually correct that it was seven weeks,  
21 right?

22 MR. GREENBERG: Yes, your Honor.

23 THE COURT: Okay, let's see. Also on page 2  
24 of Mr. Williams' letter -- I'm referring now to DE-52  
25 in the docket. On page 2, he states the following:

1 "Additionally, the undersigned submits that since  
2 plaintiff's motion for a default judgment was filed,  
3 there have been decisions in this district that have  
4 held that the statutory maximum allowed under New York  
5 Labor Law Section 195(1) and (3), prior to February  
6 27<sup>th</sup>, 2015, which is \$2,500, cannot be added to the  
7 statutory maximum allowed on or after February 27<sup>th</sup>,  
8 2015 which is \$5,000, as plaintiff's memorandum of law  
9 and damage chart reflect. In other words, \$5,000 has  
10 been held to be the absolute maximum a plaintiff can  
11 receive under Labor Law 195(1) and (3). And as such,  
12 the plaintiff only seeks \$5,000, the statutory maximum  
13 on these claims, rather than the \$7,500 indicated in  
14 his motions papers."

15 The section of the New York Labor Law 195  
16 chart, to the right, the last column, it says  
17 "statutory penalties." That \$7,500 figure at the  
18 bottom of each of those should really say \$5,000,  
19 correct?

20 MR. GREENBERG: Yes, your Honor.

21 THE COURT: Okay. I don't know if you have  
22 a calculator here but we're going to go over these  
23 numbers so that I have them in the record. I'm asking  
24 my trusty law clerk to do my calculations for me, all  
25 right?



1 MR. GREENBERG: I'm going to turn on my  
2 phone. Thank you. I just need a minute for it to turn  
3 on, your Honor.

4 THE COURT: Okay.

5 MR. GREENBERG: Thank you.

6 THE COURT: Looking to the overtime  
7 compensation provision for both the Fair Labor  
8 Standards Act and the New York Labor Law, for the year  
9 2013, the number of weeks at issue here is 7, the  
10 number of hours worked per week is 65, which means each  
11 week that the plaintiff was working, he was actually  
12 accumulating 25 hours of overtime but being paid at a  
13 straight rate for that time, when he should have been  
14 paid -- the straight rate being \$10 an hour, where he  
15 should have been paid \$15 an hour for those extra 25  
16 hours. So the difference here is \$5 per hour of  
17 overtime hours.

18 If you multiply it out then, 25 times 5, you  
19 come up with \$125 of overtime due and owing for each  
20 week. Multiply that by 7 for example, for the year  
21 2013, the number comes out to \$875. That much I can do  
22 in my head. From there, it's going to get a little  
23 more complicated, all right?

24 MR. GREENBERG: Yes, your Honor.

25 THE COURT: So now we're in 2014. Mr.

1 Tartici testified he worked throughout that year, so  
2 we're essentially talking about 52 work weeks. Again,  
3 he testified he was working the same hours every week,  
4 so we have 65 hours of work time actually accumulated,  
5 which again as we saw in the first calculation, means  
6 that he was entitled to 25 hours of overtime being paid  
7 at time and a half. So coming across the columns here  
8 and using that \$5 figure again for the 25 hours for  
9 each of the individual weeks, it comes out to \$125 a  
10 week, and here's where you have to help me out, 52  
11 weeks times \$125. What do you get?

12 THE CLERK: \$6,500.

13 THE COURT: \$6,500?

14 MR. GREENBERG: \$6,500.

15 THE COURT: Very good. Okay, so we're  
16 agreed on that. Then using that same formula for 2015,  
17 the number of weeks worked here is 28. The plaintiff  
18 testified that he stopped working as of July 11<sup>th</sup>, is  
19 that right?

20 MR. GREENBERG: Yes, your Honor.

21 THE COURT: July 12<sup>th</sup>, I'm sorry. He had  
22 that one extra day, July 12<sup>th</sup>. Again, 65 hours, 25  
23 hours of overtime at the rate of \$5 brings him to \$125  
24 due and owing for each week multiplied by 28 weeks.  
25 What do you get for that? \$3,500, good, the same

1 thing. So if we can add up the \$875, \$6,500 and  
2 \$3,500, \$10,875 is our calculated number. It matches  
3 the number on the chart, so I find that that is the  
4 amount of wages due and owing for overtime under the  
5 FLSA New York Labor Law provisions for Mr. Tartici for  
6 the period of his employment.

7 Moving down to the wage notice statutory  
8 penalties, we know at this point that the maximum,  
9 regardless of the time that he was working, can't  
10 exceed \$5,000. So for the first round, for the years  
11 2013 through 2015, the maximum number here is \$5,000 by  
12 statute, so I am adopting that finding and using the  
13 \$5,000 as the correct number. That is for the wage  
14 notice violations.

15 Then we go down to the wage statement  
16 statutory penalties. Once again, by statute at this  
17 point, the maximum that's collectible is \$5,000, so  
18 that is the number that I'm adopting for that violation  
19 and find that Mr. Tartici is owed \$5,000 based on the  
20 Labor Law 195(3), which is the wage statement statutory  
21 penalties. So now we have, taking together the \$5,000  
22 and the \$5,000 and adding it to the overtime  
23 compensation, you're talking of an overall number then  
24 up to now of \$20,875. Agreed?

25 MR. GREENBERG: Yes, your Honor.

1 THE COURT: Okay. So now let's go over to  
2 the liquidated damages provision. Let's talk about the  
3 interest issue first because the interest is only on  
4 the wages. I don't know, Mr. Greenberg, if this was  
5 you who calculated this out or Mr. Williams. But in  
6 any event, I would just make a notation here since I  
7 had to check on this myself as to when the actual --  
8 what date really this runs from.

9 I'm looking at a case called Kernes v.  
10 Global Structures, LLC. The citation is 2016 W.L.  
11 880199 (S.D.N.Y. March 1<sup>st</sup>, 2016). It's Magistrate  
12 Judge Freeman's report and recommendation to Judge  
13 McMann, Colleen McMann, about FLSA calculation. The  
14 reason I bring this to your attention is because  
15 there's a very helpful section on the pre-judgment  
16 interest provision which we're talking about here now  
17 and I just want to put this in the record.

18 The court says, "Generally, the decision to  
19 award pre-judgment interest is discretionary and is  
20 based on the need to fully compensate the wronged  
21 party, the fairness of the award and the remedial  
22 purpose of the statute involved. A plaintiff who  
23 recovers liquidated damages under the FLSA, however, is  
24 not also entitled to pre-judgment interest on his or  
25 her FLSA damages." The upshot of this being you can

1 get interest on the New York Labor Law portion of the  
2 award but not on the FLSA provision. I trust either  
3 you're aware of that or at least you understand that at  
4 this point, Mr. Greenberg.

5 MR. GREENBERG: I understand it now, your  
6 Honor.

7 THE COURT: Okay. It cites to a case that I  
8 spoke about earlier this afternoon, which is Furman v.  
9 Las Delicias Peruanas Restaurant, Inc., 93 F.Supp.3d 19  
10 at page 48 (E.D.N.Y. 2015), which says, "It's well-  
11 settled that in an action for violations of the FLSA,  
12 pre-judgment interest may not be awarded in addition to  
13 liquidated damages." That's quoting Begum v. Areba  
14 Disk, Inc., 2015 W.L. 223780 (S.D.N.Y. January 16<sup>th</sup>,  
15 2015).

16 Judge Freeman went on to state, "Given that  
17 FLSA liquidated damages serve a compensatory rather  
18 than a punitive purpose, there's no need to employ pre-  
19 judgment interest to restore plaintiffs to a position  
20 they would have otherwise enjoyed absent the wage  
21 protection violation." Then she says, "In contrast,  
22 under the New York Labor Law, a plaintiff may recover  
23 both liquidated damages and pre-judgment interest."  
24 That's under the New York Labor Law provisions, again  
25 quoting from Furman at page 48 and the Begum case at

1 \*3.

2 "Because New York State views liquidated  
3 damages as punitive and not compensatory, pre-judgment  
4 interest is not a duplicative damages award." That's  
5 from the Furman case at page 48, explaining that the  
6 purpose of liquidated damages under the New York Labor  
7 Law is to constitute a penalty on an employer's wilful  
8 withholding of wages dues, while the purpose of pre-  
9 judgment interest is to compensate a plaintiff for the  
10 loss of use money. "A plaintiff may recover both New  
11 York Labor Law liquidated damages and pre-judgment  
12 interest even where liability is found not only under  
13 the New York Labor Law but also under the FLSA."  
14 That's quoting the Begum case at \*3. Under the state  
15 law, "Pre-judgment interest is calculated on the unpaid  
16 wages due under the New York Labor Law, not on the  
17 liquidated damages awarded under the state law."  
18 That's a quote from the Mahena (ph) case, another  
19 fairly well-known case at this point, 2013 W.L. 3023505  
20 at \*8, note 11.

21 As to the calculation of the interest, Judge  
22 Freeman is quoting here from a case called Najden (ph),  
23 2015 W.L. 6125436 at \*4, where the court said,  
24 "Pursuant to New York State law, a successful plaintiff  
25 may receive pre-judgment interest at a rate of 9% per

1 year." So now the question goes to, all right, what's  
2 the date from which the interest should begin to run.  
3 Judge Freeman is quoting from a case here where she  
4 says, "As to the date from which interest should be  
5 found to run, Section 5001(b) sets forth two methods of  
6 calculating pre-judgment interest." That's from  
7 Alvarez v. 215 North Avenue Corporation, 2015 W.L.  
8 3855285 at \*3, adopting a report and recommendation.

9 Here's what that case says: "First,  
10 interest may be calculated from the earliest  
11 ascertainable date the cause of action existed."  
12 That's from the 5001(b) section of the CPLR. "However,  
13 where damages were incurred at various times, interest  
14 shall be computed upon each item from the date it was  
15 incurred or upon all of the damages from a single,  
16 reasonable, intermediate date." That's from the  
17 Alvarez case at \*3. Finally, she says, "It's within  
18 the court's wide discretion to determine a reasonable  
19 date from which to award pre-judgment interest."

20 What the chart shows me, and I'm assuming  
21 here it's what Mr. Williams' calculated -- he's taken  
22 the approach which I agree with. This is the approach  
23 I would take, which is to determine a single,  
24 reasonable, intermediate date. He has listed here the  
25 New York claims period starts obviously the first day

1 of Mr. Tartici's employment, which is November 10<sup>th</sup> of  
2 2013, the end date being the last date of his  
3 employment on July 11<sup>th</sup>, 2015. Figuring out the  
4 approximate midpoint here of September 10<sup>th</sup>, 2014 I find  
5 to be a reasonable intermediate date, and I'm going to  
6 adopt that date, okay?

7 MR. GREENBERG: Thank you.

8 THE COURT: What I'm not going to do,  
9 however, is we're not going to calculate the interest  
10 ourselves. We usually have the clerk's office do that.

11 MR. GREENBERG: Yes.

12 THE COURT: Because they're much more in  
13 tune with entering judgments and doing what has to be  
14 done. What I will do, however, is to direct them to  
15 use the September 10<sup>th</sup>, 2014 date as a starting point  
16 for running the pre-judgment interest, all right?

17 MR. GREENBERG: Thank you.

18 THE COURT: As to the liquidated damages,  
19 that's the one thing here where there's no guess-work,  
20 which is simply doubling the wages owed, so that number  
21 will stay as is. We are at a point where we can  
22 reasonably calculate everything except a precise number  
23 for the pre-judgment interest, which we'll, as I said,  
24 take care of having the clerk's office handle if and  
25 when we get to that point.



1           Those are my findings. That's what I'm  
2   leaving in the record because we're going to have to  
3   come back to this at some point. As I said, since Mr.  
4   Tartici was here today, I didn't want to make him come  
5   back a second time. I'd rather get this on the record  
6   with the assumption that there's going to be a refiling  
7   with respect to the service issues here.

8           MR. GREENBERG: Yes, thank you, your Honor.

9           THE COURT: So what I'm going to do is put  
10   in an abbreviated report and recommendation to Judge  
11   Spatt, explaining that this hearing took place, I've  
12   made a number of findings on the record. However, we  
13   have this issue that's arisen with respect to the  
14   service, so for the moment, I'm going to recommend to  
15   him that the motion itself be denied but without  
16   prejudice and with the right to bring it back again  
17   once those issues have been resolved, all right?

18          MR. GREENBERG: Thank you again, your Honor.

19          THE COURT: I think that's as far as we can  
20   go for today's purposes, unless there's anything else  
21   you want to address.

22          MR. GREENBERG: No, thank you.

23          THE COURT: Mr. Greenberg, I'll tell you  
24   that like with every other plaintiff when I'm in a  
25   default here, you're going to have to order the

1 transcript, all right?

2 MR. GREENBERG: Yes.

3 THE COURT: I'm not looking to have you get  
4 an expedited one but if you want, I'll ask my courtroom  
5 deputy Mary to come on out. She will take care of the  
6 information getting processed for you.

7 MR. GREENBERG: Thank you.

8 THE COURT: Mr. Tartici, good luck, okay?

9 MR. TARTICI: Thank you, your Honor.

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I certify that the foregoing is a correct  
transcript from the electronic sound recording of the  
proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read 'EB', with a long horizontal stroke extending to the right.

ELIZABETH BARRON

March 27, 2019